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No.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

JAN M. WEINBERG,

Petitioner,

vs.

MANAGEMENT COMPANY ENTERTAINMENT GROUP, INC., FORUM HOME VIDEO, INC., JONATHAN D. KRANE, WILLIAM J. ROUHANA, JR. and WINSTAR CORPORATION,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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27 pp

QUESTION PRESENTED FOR REVIEW

I. Does a minority shareholder of a closely held corporation have a private right of action against a dominant majority shareholder and the directors of the corporation who have breached their fiduciary duty to that minority shareholder?

II. Did the District Court and Court of Appeals have the right to interfere with an agreement of stipulation between petitioner and respondent which had been approved by the Bankruptcy Court for the Central District of California?

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I, Jan M. Weinberg, respectfully pray that a Writ of Certiorari issue to review the judgement of the United States Court of Appeals for the Second Circuit entered on October 13, 1995. My timely motion for rehearing was denied on December 21, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit denying the petition for rehearing is printed hereto at page 1a of the Appendix. The opinion of the United States Court of Appeals for the Second Circuit is appended hereto at page 2a. The opinion of the United States District Court for the Southern District of New York is appended at7a.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was entered on October 13, 1995. My Petition for Rehearing, which was timely filed, was denied by the United States Court of Appeals for the Second Circuit on December 21, 1995. This Court has jurisdiction to review the Judgment of the United States Court of Appeals for the Second Circuit by Writ of Certiorari pursuant to 28 U.S.C § 1254 (1).

STATUTES INVOLVED

There are no statutory provisions involved.

STATEMENT OF THE CASE

On December 31, 1987 I entered into a contract with the respondent Management Company Entertainment Group, Inc. ("MCEG") to sell 40 of my 50 shares of voting common stock in a company which I founded known as Forum Home Video, Inc. ("Forum"). In return I received an option to purchase MCEG

stock and 200 newly issued preferred shares of Forum. I was to have been paid dividends of 12% per annum on my preferred shares. I also received the right to redeem my preferred shares for $200,000 at any time after the expiration of three years from the date of the agreement.

As a result of these transactions, I became a minority owner of Forum common stock and its only preferred shareholder. MCEG was controlled by respondents Jonathan D. Krane ("Krane"), William J. Rouhana, Jr. ("Rouhana") and Winstar Corporation ("Winstar"). Winstar was a corporate vehicle through which Rouhana provided management services to MCEG. Krane and Rouhana were officers and directors of MCEG. After the acquisition of Forum, Forum's operation was also under the direct control and supervision of respondents Krane, Rouhana and Winstar.

At the time of the acquisition, Forum had significant assets in the form of customers, suppliers, licensing rights, cash in banks, accounts receivable and a talented management team. In 1989 Krane, Rouhana and Winstar caused Forum to enter into an agreement with Virgin Visions, Inc. ("VVI") whereby Forum's business and principal assets were transferred to VVI. At that time Krane, Rouhana and Winstar also decided to take MCEG's distribution business out of Forum and to consolidate it in VVI. As result of these transactions, Forum ceased to operate and was left as an empty corporate shell. After the VVI transaction, Krane was quoted in a prominent trade journal as saying that "Forum does not exist as a separate entity any more."

Rouhana admitted that the two minority shareholders of Forum (Medusa and Weinberg) were adversely affected and had legitimate complaints. The respondents addressed Medusa's complaint. An agreement was entered into between VVI, Medusa, Forum and MCEG pursuant to which Medusa received

three million dollars. Nothing was ever done to compensate me for my loss. Krane, Rouhana, Winstar and MCEG breached their fiduciary duty to me by stripping Forum of its assets and transferring them to a different operating entity leaving Forum as a non-operating shell corporation rendering my common and preferred shares worthless.

Though finding "much evidence" of breach of fiduciary duty, the District Court dismissed my claims on summary judgment against all defendants in April, 1992. Upon appeal, the Court of Appeals for the Second Circuit returned the case to the District Court for lack of a final judgment finding that the District Court was barred by the automatic bankruptcy stay from rendering judgment for Forum and MCEG.

In August, 1994 I entered into a stipulation with respondents MCEG and Forum pursuant to which those corporations agreed to a default judgment against them in this case provided that I could only enforce the judgment against their liability insurers and the proceeds of their liability insurance policies. On August 26, 1994 the Stipulation was approved by an order of the United States Bankruptcy Court for the Central District of California and the automatic bankruptcy stay was lifted for the sole purpose of allowing judgment to enter in this case in accord with the Stipulation. In January, 1995 the District Court again granted summary judgment of dismissal on all counts and refused to enter judgment against MCEG and Forum in accord with the Stipulation. In October, 1996 the Court of Appeals for the Second Circuit affirmed and, in December 1996, denied my petition for rehearing.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE RAISES AN ISSUE OF GREAT LEGAL SIGNIFICANCE FOR MINORITY SHAREHOLDERS OF CLOSELY HELD CORPORATIONS WHERE A DOMINANT SHAREHOLDER AND THE CORPORATION'S DIRECTORS HAVE BREACHED THEIR FIDUCIARY DUTY TO THEM.

The District Court and the Court of Appeals acknowledged my injury but held that I have no private right of action.

I was the owner of 10 of the common stock of Forum and the only owner of preferred stock of Forum. MCEG was the owner of the majority of the common stock of Forum and both MCEG and Forum were controlled by Krane and Rouhana who were directors and officers of both corporations. They breached their fiduciary duty to me as a minority shareholder when they looted Forum by:

(a) transferring substantially all of Forum's assets to Virgin Visions, Inc. without adequate consideration;

(b) failing to give me notice of such transfers;

(c) failing to hold shareholder meetings;

(d) failing to act in the best interest of Forum in its dealings with MCEG of which they were also directors, officers and controlling persons;

(e) failing to act in good faith in actions taken and agreements made among Forum, MCEG and Virgin Visions;

(f) failing to give Forum shareholders notice and to seek their approval of the transfer and/or relinquishment of substantially all of the corporate assets of Forum.

The District Court found the following with respect to my claim for corporate waste and breach of fiduciary duty:

> This branch of the complaint pleads a good claim for corporate waste by the individual defendants as officers and directors of Forum, dealing with MCEG, in which they also had interests of a conflicting nature. There is much evidence to suggest a breach of fiduciary duty. The difficulty is that this claim belongs to Forum and must be asserted derivatively for the benefit of Forum's shareholders and creditors.

Appendix C, 14a.

The Court of Appeals for the Second Circuit agreed with the District Court that as a minority shareholder in Forum there was much evidence that the respondents had breached their fiduciary duty to me but said I had no right to bring a private direct action against them. I was, at the time this case was commenced, the sole minority shareholder of Forum and its only preferred shareholder. Moreover, Forum was a company which I and my partner had founded with great effort and at great expense. These respondents effectively stole my company from me by failing to pay me the consideration which they had promised and by thereafter looting the company of all of its assets. Yet I have been told by the District Court and the Court of Appeals that I have no recourse by way of a private direct action to redress these injustices. This cannot be the law.

II.

THERE IS DIRECT CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT AND PRIOR DECISIONS OF THIS COURT.

The Court of Appeals in denying me a private right of action relied on *In re Ionosphere Clubs. Inc.*, 17 F.3d 600, 605-06 (2d Cir. 1994). It held that to sue individually I must be injured directly or independently of the corporation and must allege more than an injury resulting from a wrong to the corporation. In fact I have alleged such wrong as required by the *Ionosphere* case. But my petition goes further than that. I submit that the *Ionosphere* case is contrary to prior case law of this Court.

This Court has clearly held that the breach of fiduciary duty of a director or dominant shareholder gives rise to direct actions by minority stockholders in their own right. *Pepper v. Litton*, 308 U.S. 295, 307 n. 15 (1939); *Strong v. Repide*, 213 U.S. 419. The rule of the *Ionosphere* case as applied in this case is directly contrary to the principles set forth in those cases. As a result it is incumbent upon this Court to grant this Petition and to clarify the rights of minority shareholders in a closely held corporation who have been cheated by the dominant shareholders of the corporation and its directors.

It is essential for the Court to do this because minority shareholders in a closely held corporate setting such as mine are extremely vulnerable to abuses by the dominant shareholder and its officers and directors and must have a right of direct action to redress these abuses.

III.

THE DISTRICT COURT AND COURT OF APPEALS HAD NO RIGHT TO INTERFERE WITH THE AGREEMENT OF STIPULATION BETWEEN THE PARTIES APPROVED BY THE BANKRUPTCY COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

I reached an agreement with MCEG and Forum which was freely entered into by all parties. MCEG and Forum stipulated to judgment in this case. The stipulation was reviewed and approved by the United States Bankruptcy Court for the Central District of California which had jurisdiction over all the parties.

The District Court in New York and the Court of Appeals had no right to interfere with that agreement.

This Court is asked to correct this injustice. *Pepper v. Litton*, *supra* at 305.

CONCLUSION

For all of the above reasons the Petition should be granted.

Respectfully submitted,

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APPENDIX A — ORDER DENYING PETITION FOR REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED DECEMBER 21, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20th day of December, one thousand nine hundred and Five.

Present:
Hon. RALPH K. WINTER
Hon. DENNIS G. JACOBS
Hon. PIERRE N. LEVAL
CIRCUIT JUDGES,

95-7212 Weinberg v. Management Co. Enter

A petition for rehearing having been filed herein by Pro Se Appellant Jan Weinberg, Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

GEORGE LANGE III, Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED NOVEMBER 14, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse, Foley Square in the City of New York, on the 13th day of October one thousand nine hundred and ninety-five.

Present:

Honorable Ralph K. Winter,
Honorable Dennis G. Jacobs,
Honorable Pierre N. Leval,
Circuit Judges.

#95-7212

JAN M. WEINBERG,

Plaintiff-Appellant,

v.

MANAGEMENT COMPANY ENTERTAINMENT GROUP, INC., FORUM HOME VIDEO, INC., JONATHAN D. KRANE, WILLIAM J. ROUHANA, JR., and WINSTAR CORPORATION,

Defendants-Appellees.

ORDER

Appendix B

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was submitted.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Jan Weinberg appeals from Judge Brieant's grant of summary judgment dismissing his complaint. Weinberg argues that: (i) he has standing to assert a direct, as opposed to a derivative, claim for breach of contract, corporate waste, misappropriation of corporate assets and breach of fiduciary duty; (ii) there is a genuine issue of material fact with respect to his securities fraud claim; (iii) his common law fraud claim similarly survives; and (iv) he should be granted a default judgment against the corporate defendants pursuant to their stipulation with him and pursuant to an order of the bankruptcy court. We disagree.

We review the grant of a motion for summary judgment *de novo. United States v. Articles of Banned Hazardous Substances,* 34 F.3d 91, 96 (2d Cir. 1994). Summary judgment is appropriate where there are no genuine issues as to any material fact and the prevailing party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). "[I]n assessing the record to determine whether there is a genuine issue as to any material fact, the court is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom summary judgment is sought." *Cronin v.*

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Aetna Live Ins. Co., 46 F.3d 196, 202 (2d Cir. 1995) (citations omitted).

We discussed the distinction under Delaware law between a direct action and a derivative action in *In re Ionosphere Clubs, Inc.*, 17 F.3d 600, 605-06 (2d Cir. 1994). We held that to have standing to sue individually, a plaintiff must be injured directly or independently of the corporation and that the plaintiff must allege more than an injury resulting from a wrong to the corporation. *Id.* at 606.

Weinberg claims that appellees Jonathan Krane, William Rouhana, WinStar Corporation and Management Company Entertainment Group, Inc. ("MCEG"), without notice to him as a shareholder of Forum Home Video, Inc., looted Forum by transferring all of its business and assets to Virgin Visions, Inc. He alleges that he was damaged by the corporations' consequent inability to pay all the dividends due him or to redeem his preferred shares. We held in *Ionosphere* that an injury to preferred shareholders' contractual rights to receive dividends were not inflicted "directly" or "independently of the corporation" and that these injuries were only an indirect consequence of the wrongs against the corporation. *Id.* at 606. Therefore, the injury to Weinberg with regard to the redemption of his preferred shares is similarly an indirect consequence of wrongs against the corporation.

With regard to Weinberg's argument that even if this claim is not direct, it is derivative and that he has standing to maintain such action, we agree with the district court that because he is no longer a shareholder, Weinberg may not bring such an action now.

Appendix B

Weinberg also alleges violations of Section 12(2) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and SEC Rule 10b-5, based on alleged misrepresentations that: (i) Forum would pay dividends on Weinberg's preferred stock; (ii) Weinberg would have a "put" option to compel Forum to repurchase the preferred shares; (iii) MCEG would develop and expand the business of Forum; and (iv) MCEG would acquire Weinberg's other companies. However, Weinberg has shown only that the lack of commercial success prevented appellees from carrying out their promises. Weinberg's common law fraud claim fails for the same reasons.

Weinberg argues that he is entitled to a default judgment against the corporate defendants in accordance with their stipulation. In *Davis v. Musler*, 713 F.2d 907, 912 (2d Cir. 1983), we stated that default judgments "implicate sharply conflicting policies . . . and the trial judge, who is usually 'the person most familiar with the circumstances of the case and is in the best position to evaluate the good faith and credibility of the parties,' is entrusted with the task of balancing these competing considerations." We stated there that the decision of the district court would be upheld unless "clearly wrong." *Id.* 912. The district court noted that the stipulation and the order that resulted therefrom "implicated parties other than the plaintiff and the debtors, namely, the insurers who were not parties to it," and said that it would be "a rather bizarre violation of the insurer's right to due process" to permit a default judgment to be entered against the corporation which would be enforceable against them. We agree.

We therefore affirm.

Appendix B

s/ Ralph K. Winter
Hon. Ralph K. Winter, U.S.C.J.

s/ Dennis G. Jacobs
Hon. Dennis G. Jacobs, U.S.C.J.

s/ Pierre N. Leval
Hon. Pierre N. Leval, U.S.C.J.

A TRUE COPY
GEORGE LANGE III, CLERK
s/ George Lange III

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED APRIL 22, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 4494 (CLB)

JAN M. WEINBERG,

Plaintiff,

-against-

MANAGEMENT COMPANY ENTERTAINMENT GROUP, INC., FORUM HOME VIDEO, INC., JONATHAN D. KRANE, WILLIAM J. ROUHANA, JR. and WINSTAR CORPORATION,

Defendants.

MEMORANDUM & ORDER

Brieant, Chief Judge

In this action, pleading seven different claims essentially based on securities fraud, plaintiff and the defendants Krane, Rouhana and Winstar each seek summary judgment in their favor. The remaining defendants, Management Company Entertainment Group, Inc. ("MCEG") and Forum Home Video, Inc., ("Forum") have each found refuge as debtors in proceedings pending in the United States Bankruptcy Court for

the Central District of California, filed respectively on October 31, 1990 and March 8, 1991.[1] *See* Doc. 10 and 29.

The motions were heard and fully submitted for decision on March 25, 1992.

The complaint, which pleads diversity, as well as federal question jurisdiction, alleges the following claims: In the First Count plaintiff alleges a violation of Section 12(2) of Securities Act of 1933, 15 U.S.C. §77-1 in connection with the sale by plaintiff of securities in Forum to MCEG in return for preferred shares of Forum and option rights. Complaint ¶ 21. The Second Count alleges securities fraud and violations of Section 10b of the Securities Exchange Act of 1934, 15 U.S.C. §78J(b), and Rule 10b-5, 17 CFR §240.10b-5. Complaint ¶ 28. The Third Count alleges common law fraud including reliance, arising out of the same transaction alleged in the first two counts. Complaint ¶ 29-32.

The Fourth Count alleges that plaintiff is a 10% common stock shareholder of Forum and owner of 200 shares of preferred stock of Forum, that MCEG as the owner of the majority of the common stock of Forum, and Krane and Rouhana as directors, and officers and controlling persons of Forum and MCEG, breached their fiduciary duty to the plaintiff as a shareholder of Forum by:

> (a) transferring substantially all of Forum's assets to MCEG Virgin Home Entertainment without adequate consideration;

---

1. On October 31, 1990, an involuntary petition under Chapter 7 was filed against MCEG. Doc. 10. On March 8, 1991, Forum filed a voluntary petition under Chapter 11. Doc. 29, ¶ 3.

(b) failing to give shareholders notice of such transfers;

(c) failing to hold shareholder meetings;

(d) failing to act in the best interest of Forum in its dealings with MCEG of which they are also directors, officer and controlling persons;

(e) failing to act in good faith in actions taken and agreements made among Forum, MCEG and Virgin Visions;

(f) failing to give Forum shareholders notice and to seek their approval of the transfer and/or relinquishment of substantially all of the corporate assets of Forum.

This claim seeks recovery of "damages suffered by plaintiff as a shareholder of Forum." Complaint ¶ 38.

The Fifth Count alleges a breach of contract (the "Stock Purchase Agreement" of December 31, 1987) in that, defendants "fail[ed] to cause Forum to pay the monthly dividends on the preferred shares . . . and by caus[ing] the plaintiff's shares and option rights to be substantially worthless by transferring substantially all of Forum's assets to MCEG Virgin Home Entertainment without adequate consideration." Complaint ¶ 42. This claim also pleads a breach of the obligation of good faith with respect to the Stock Purchase Agreement. The Sixth Count is the traditional Civil RICO, and the Seventh Count pleads a Civil RICO conspiracy.

Appendix C

The complaint seeks an "immediate accounting of all transactions pertaining to the transfer of the assets of Forum to MCEG Virgin Home Entertainment, MCEG, Krane or Rouhana" and compensatory and punitive damages. Complaint, at 19-20.

The facts to the extent revealed by documents and affidavits as viewed most favorably to the plaintiff, disclose that prior to December 31, 1987 plaintiff Weinberg and Michael Olivieri, an individual not a party to this suit, were the only shareholders in Forum each holding an equal amount of shares. On that date, advised by counsel of their own choosing, and negotiating at arms length, they entered into an extensive formal written agreement consisting of 69 pages including exhibits annexed, whereby MCEG acquired 90% of the outstanding common shares of Forum with Weinberg retaining 20 shares representing 10% of the outstanding common shares.

Under the Agreement the purchaser MCEG was required to and did deliver options to purchase $425,000 shares of MCEG at a $1.00 per share during a five year period, together with 200 shares of non-voting redeemable, non-transferable preferred stock to be issued solely to Mr. Weinberg with annual cumulative dividends thereon at a per annum rate of 12% payable monthly. The Agreement provided that "Weinberg may put the Preferred Stock to Company [MCEG] after 3 years from the closing date, and the Company will have a call on the Preferred Stock at any time."

The Agreement contained all of the usual warranties and representation customarily in vogue in connection with the purchase or sale of business. The Purchaser agreed to obtain the release of sellers and Alison Olivieri, from personal liability on a bank guaranty up to $175,000.00, and did so. Section 10.3 of the Stock Purchase Agreement provided as follows:

Appendix C

> This Agreement and the Schedules and documents referred to herein, constitute the entire agreement between the parties pertaining to the subject matter contained herein and therein, and supersede all prior agreements, representations and understandings of the parties. No other representations, promises, affirmations, inducements or other statements, written or oral, which may have been made shall be of any effect or shall form any part of this agreement or the transactions contemplated thereby. No termination, supplement, modification or amendment of this Agreement shall be binding upon the parties hereto unless executed in writing by the parties hereto. No waiver of any of the provision of this Agreement shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver.

As could be imagined, like so many of the feverish mergers and acquisitions of the 1980's, the transaction soon fell apart.

Forum had been operating for more than a year at the time of the acquisition and had built up relationships with customers and suppliers. It had accounts receivable of approximately $350,000.00, and a library of films, including two which had produced retail revenues of over two million dollars each.

Under the new MCEG management, Forum in 1988, moved its business operations to California, thereby forcing out of the

company seller Michael Olivieri who had understood that he would not be required to move. Less than two months after the acquisition of Forum by MCEG, MCEG, Forum and Medusa Communications ("Medusa") entered into a "consulting" agreement pursuant to which one half of the pre-tax profits of Forum were to be paid to MCEG and Medusa.

Almost immediately thereafter, MCEG sold 35% of Forum's shares to Medusa for $280,000.00. In August of 1989 defendants Krane, Rouhana and Winstar caused Forum to enter into an agreement with Medusa and Virgin Visions, Inc., the result of which was to transfer most if not all of the ongoing business efforts of Forum and MCEG to Virgin Visions, Inc. Bankruptcy followed.

FIRST CLAIM

Section 12(2) of the 1933 Act provides that an action may be brought against any person who offers or sells a security "by means of a prospectus of oral communication, which includes an untrue statement or material fact, or omits to state a material fact necessary in order to make the statement . . . not misleading." 15 U.S.C. § 77-1(2). The representations relied on are that MCEG, Rouhana and Winstar represented that: (1) Forum would pay the 12% per annum dividends on plaintiff's preferred stock. This it did, until bankruptcy intervened, although the payments were late; (2) Plaintiff would have a "put" option to compel Forum to repurchase the preferred shares. This he did have under the Agreement, but the intervening bankruptcy frustrated any repurchase; (3) MCEG would develop and expand the business of Forum; and (4) MCEG would acquire Mr. Weinberg's other companies.

Appendix C

There is no allegation that plaintiff either tendered his Forum shares in rescission or sold them although damages are requested. Since this Court concludes that no trial jury could find in plaintiff's favor on the First Claim pleaded, defendants are entitled to summary judgement. A representation that Forum would acquire Mr. Weinberg's other businesses is simply to vague to be relied upon. It amounts at most to a representation that there will be an agreement to agree, which is traditionally not material or actionable. There is no evidence to support an inference that at the time of the sale of the security (the preferred stock) defendants Rouhana or Winstar had the present intention not to develop and expand the business. Indeed, insofar as concerns defendant Krane, plaintiff had no negotiations or discussions with him whatsoever, prior to the sale.

SECOND CLAIM

To survive judgment on a claim based on Rule 10b-5, plaintiff must present evidence supporting the existence of "material misstatements or omissions indicating an intent to deceive or defraud in connection with the purchase or sale of a security." *Luce v. Edelstein* 802 F.2d 49, 55 (2d Cir. 1986). Plaintiff must show that defendants acted with scienter — knowledge of the falsity or misleading nature of the representations, combined with an intent to deceive. *Bloor v. Caro* 754 F.2d 57, 61 (2d Cir. 1985). While a breach of contract may constitute securities fraud if a specific promise to perform a particular act in the future, or cause a corporation to do so, was made with the secret intention at the time, not to perform in the future, *Luce, supra* at 55-56, there must be some facts or circumstances shown to permit the inference of such a contemporaneous secret intent. Fraud is never presumed, and in the absence of some such evidence, summary judgment on this claim is appropriate.

Appendix C

THIRD CLAIM

We are at a loss to imagine why a count of common law fraud would be pleaded in a Rule 10b-5 case. Dismissal of the third count would seem to follow *a fortiori*. In any event, the parties were dealing at arms length, through lawyers, resulting in an Agreement with a rather detailed merger clause. Under the totality of circumstances present, there is no reasonable reliance.

FOURTH CLAIM

This branch of the complaint pleads a good claim for corporate waste by the individual defendants as officers and directors of Forum, dealing with MCEG, in which they also had interests of a conflicting nature. There is much evidence to suggest a breach of fiduciary duty. The difficulty is that this claim belongs to Forum and must be asserted derivatively for the benefit of Forum's shareholders and creditors. There is no showing that this plaintiff has the permission of the Bankruptcy Court to maintain litigation on this issue for the debtor, or that the necessary prior demand has been made. Furthermore, MCEG, a necessary defendant, is protected by the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. § 362.

FIFTH CLAIM

To the extent that this court charges that "defendants" have breached the Stock Purchase Agreement by "failing to cause Forum to pay . . . dividends on the preferred shares" or to repurchase the preferred shares, Complaint ¶¶ 41-42, defendants MCEG and Forum are protected by the automatic stay mentioned above. Also, a corporation without earnings or surplus cannot be required to pay preferred dividends or redeem preferred stock.

To the extent Rouhana or Krane caused Forum to do this, they cannot be sued individually, since the contract was solely with Forum. *Gold v. Royal Cigar Co., Inc.*, 105 A.D.2d 831, 482 N.Y.S. 2d 32 (1984). To the extent the Fifth Claim repeats the claim of breach of fiduciary duty and corporate waste charged in the Fourth Claim, the same result follows as mention above.

RICO AND RICO CONSPIRACY

The Rico claims are essentially frivolous, there being no evidence of a pattern of racketeering activity or a criminal scheme to defraud.

CONCLUSION

Summary judgment is granted to defendants dismissing all counts. Such disposition is without prejudice to a derivative action for corporate waste or breach of fiduciary duty or unlawful diversion of the corporate assets of Forum. While this Court is not sure that ours is proper venue for such a claim, plaintiff is granted a period of sixty (60) days within which if so advised, and upon complying with all conditions precedent for such litigation, including but not limited to obtaining the authority of the Bankruptcy Code to sue in the right of Forum, and relief from the stay, as to MCEG, he may serve and file an amended complaint. If applications to the Bankruptcy Court are pending for such permission and remain unresolved, this Court will enlarge the sixty (60) day period on notice. Otherwise the Clerk will enter judgement on the expiration of such period, consistent with the foregoing.

Appendix C

SO ORDERED.

Dated: April 22, 1992
White Plains, New York

s/ Charles L Brieant
Charles L. Brieant
Chief Judge

Supreme Court, U.S.
FILED
APR 25 1996
CLERK

(2)

No. 95-1550

In The

Supreme Court of the United States

October Term, 1995

JAN M. WEINBERG,

Petitioner,

vs.

MANAGEMENT COMPANY ENTERTAINMENT GROUP, INC., FORUM HOME VIDEO, INC., JONATHAN D. KRANE, WILLIAM J. ROUHANA, JR. and WINSTAR CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT JONATHAN D. KRANE

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Respondent Jonathan D. Krane ("respondent") requests that the Court deny the petition of Jan M. Weinberg ("petitioner") for a writ of certiorari seeking review of a decision of the United States Court of Appeals for the Second Circuit dated November 14, 1995 (the "Decision"). This case involves established questions of state law, a determination that no material issue of fact was raised by the petitioner, and a determination that the District Court had discretion to refuse to enter a default judgment pursuant to a stipulation based on unusual facts.

The petition does not justify the exercise of this Court's supervisory power because the petition fails to show that the Decision is: (1) in conflict with the decision of another federal court of appeals; (2) decides an important federal question in conflict with a state court of last resort; or, (3) departs from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court. There is no basis for petitioner's assertion that the Decision conflicts with other relevant decisions of this Court.

OPINIONS BELOW

The petition seeks review of the unpublished Decision of the United States Court of Appeals for the Second Circuit filed November 14, 1995. The text of the Decision is unreported, but is noted at 71 F.3d 405 (2d Cir. 1995). Petitioner's Appendix ("Pet. App.") at page 1a. The petitioner's appendix includes a decision of the United States District Court for the Southern District of New York dated April 22, 1992 (Pet. App. at page 7a). However, the decision of the Court of Appeals was not entered on appeal from that 1992 order of the District Court, but from an oral decision of the District Court announced on January 27, 1995, the transcript of which appears at Respondent's Appendix ("Resp. App.") page 1a. The petition omits all reference to the District Court's 1995 order in spite of the fact that it is the decision affirmed by the Court of Appeals.

STATUTES INVOLVED

The following statutes are involved in this case:

a. Rule 55(b) of the Federal Rules of Civil Procedure

> Rule 55. Default
>
> * * *
>
> (b) Judgment. Judgment by default may be entered as follows:
>
> * * *
>
> (2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor;
>
> * * *
>
> If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

b. Rule 56(c) of the Federal Rules of Civil Procedure

Rule 56. Summary Judgment

* * *

(c) ... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

* * *

STATEMENT OF THE CASE

The complaint in this case alleged claims of securities fraud, breach of contract, corporate waste, misappropriation of corporate assets and breach of fiduciary duty. The claims arose out of transactions between a corporation and its partially-owned subsidiary, in which petitioner was also a shareholder. The District Court granted respondents' motion for summary judgment dismissing the complaint and as to some of the claims held that petitioner lacked standing to assert derivative claims. The Court of Appeals affirmed.

A. Petitioner's Standing.

On October 31, 1990, Management Company Entertainment Group Inc. ("MCEG") became a debtor in proceedings in the United States Bankruptcy Court for the

Central District of California. On March 6, 1991, Forum Home Video Inc. ("Forum") also became a debtor in the same court, in a proceeding which was substantively consolidated with MCEG's proceeding. The majority of Forum stock was owned by MCEG. Petitioner was also an owner of Forum shares. By order dated March 19, 1992, the Bankruptcy Court confirmed a Chapter 11 plan of reorganization for the consolidated debtors which specifically cancelled all securities issued by MCEG and Forum, including those issued to petitioner. A copy of the relevant portions of the Bankruptcy Court order are annexed at Resp. App. 12a-14a and relevant portions of the plan of reorganization are annexed at Resp. App. 15a-18a. All of petitioner's Forum shares were cancelled by the plan of reorganization and the Bankruptcy Court order and petitioner ceased to be a shareholder of Forum at that time. The Court of Appeals held that once petitioner's shares were cancelled, he lost standing under Delaware law to assert derivative claims on behalf of Forum.

Respondent Krane had been an officer and director of MCEG and Forum. By agreement dated September 26, 1991, MCEG, Forum, and the other consolidated debtors gave Krane a general release from any claims which MCEG or Forum had against him. A copy of the release portion of that agreement and the Bankruptcy Court order approving it are annexed at Resp. App. 19a-22a. This release bars any claim against Krane by Forum which petitioner could assert derivatively.

B. The Stipulation and Default Judgment.

MCEG and Forum sought sanctions in the Bankruptcy Court against petitioner for prosecuting this action in the District Court in violation of the automatic stay in bankruptcy cases. The Bankruptcy Court granted sanctions against petitioner, which were affirmed by the United States District Court for the Central District of California, and an appeal from that order was

dismissed by the United States Court of Appeals for the Ninth Circuit. Petitioner then entered into a stipulation with MCEG and Forum dated August 27, 1994 (the "Stipulation") in which MCEG and Forum agreed to modify the bankruptcy stay to allow petitioner to obtain a judgment by default in this action against them in the District Court and to enforce such judgment by default solely against MCEG and Forum's liability insurers and the proceeds of their liability insurance policies. The Stipulation was approved by an order of the Bankruptcy Court entered August 30, 1994. A copy of the Stipulation and the Bankruptcy Court order approving it are annexed at Resp. App. at 23a-32a and Resp. App. at 33a-35a, respectively.

Petitioner then moved for a default judgment in this case based upon the Stipulation. The District Court exercised its discretion not to enter a default judgment. Resp. App. at 8a. The Court of Appeals agreed with the District Judge's holding that the Stipulation implicated the rights of the insurers who were not parties to the Stipulation and that it would be "a rather bizarre violation of the insurers' right to due process" to permit a default judgment to be entered against the corporation which would be enforceable against them. Resp. App. at 7a. The petition does not disclose to the Court the background of the refusal of the District Court to enter a default judgment on the basis of the Stipulation.

REASONS FOR DENYING THE WRIT

I.

THE PETITION PRESENTS NO QUESTION OF FEDERAL LAW FOR THIS COURT TO REVIEW.

The Court should not exercise its discretion to grant the petition for certiorari in this case. There is no alleged split between the federal circuits on the issue of Delaware law in this

case, nor is there any significant federal question raised by the petition.

The Court of Appeals held that under Delaware law, petitioner's claims of corporate waste and breach of fiduciary duty by corporate directors are derivative claims. The Court held that to state a direct claim a stockholder must be injured directly or independently of the corporation and must allege more than an injury resulting from a wrong to the corporation. The Court relied on its prior decision in *In re Ionosphere Clubs, Inc.*, 17 F.3d 600, 605-06 (2d Cir. 1994), which reviewed and applied Delaware law on this issue. Petitioner has not shown that the Court of Appeals applied Delaware law incorrectly.[1]

Under Delaware law, claims of wrongs to a corporation which deplete or destroy corporate assets and reduce the value of the corporation's stock, are derivative claims. Where a plaintiff has a "special injury" affecting him alone, directly and independently of the corporation, it is a direct claim. *Kramer v. Western Pacific Industries*, 546 A.2d 348, 351, 353 (Del. 1988); *Lipton v. News Int., plc.*, 514 A.2d 1075 (Del. 1986); *Bokat v. Getty Oil Co.*, 262 A.2d 246, 249 (Del. 1970); and *In re Ionosphere Clubs, Inc.*, 17 F.3d 600, 605-06 (2d Cir. 1994).

Under Delaware law, a party who brings a derivative suit on behalf of a corporation must remain a shareholder throughout the litigation, and if the shares are sold or cancelled, the party's standing to maintain the derivative action is extinguished. *Kramer, supra* at 354; *Lewis v. Anderson*, 477 A.2d 1040 (1984).

---

1. The District Court, exercising diversity jurisdiction, held that the choice of law rules of the forum state (New York) would apply Delaware law to petitioner's claim involving the internal affairs of a Delaware corporation. *Klaxon v. Stentor Electric*, 313 U.S. 486, 487 (1942), Restatement (2d) of Conflict of Law, §§ 306 and 309. Petitioner does not contest the choice of Delaware law.

The injury to petitioner was neither direct nor independent of any effect on the corporation. Petitioner claims that because of the alleged breach of fiduciary duty and corporate waste, Forum was unable to pay its debts, including its contractual obligation to pay dividends to him. The claim clearly falls within the category of derivative claims as defined by the Delaware courts. In addition, petitioner lost standing to assert any derivative claim when the Bankruptcy Court cancelled all outstanding shares of Forum, including petitioner's.

II.

THERE IS NO CONFLICT WITH THIS COURT'S PRECEDENTS OR AMONG THE CIRCUITS .

Petitioner incorrectly asserts that the application by the Court of Appeals of Delaware law regarding derivative claims to his claims of waste and breach of fiduciary duty denied his private right of action contrary to the Court's decisions in *Pepper v. Litton*, 308 U.S. 295 (1939) and *Strong v. Repide*, 213 U.S. 419 (1909).

In *Pepper, supra*, this Court held that a director's fiduciary duty to a corporation would normally be enforced in a derivative suit or by a bankruptcy trustee. *Pepper*, 308 U.S. at 307. The Court stated that "a breach of that duty *may* also give rise to direct actions by stockholders in their own right." *Pepper*, at 307, n. 15 (emphasis added), citing, *Strong v. Repide*, 213 U.S. 419 (1909). The Decision does not say that a stockholder cannot have a direct claim against a director for breach of fiduciary duty, but that applying Delaware law to the facts of this case, petitioner could not support an independent claim. This Court recognized that there are circumstances, such as in the *Strong* case, where a stockholder may assert a direct claim for breach of a fiduciary duty owed directly to the shareholder. The Court in *Pepper* did

not hold that a stockholder has a right to assert a direct claim for breach of fiduciary duty by a director to the corporation. This is clear from the Court's reference to *Strong, supra.*

In *Strong, supra,* the Court held that a director who purchased a stockholder's shares in a corporation without disclosing to the stockholder knowledge which the director had regarding the value of the shares had defrauded the stockholder. The Court held that upon the facts and circumstances of that case, and applying the relevant law of the Philippine Islands, the stockholder had a direct claim. The breach of the duty of full disclosure caused the injury to the stockholder and was personal to him because of his sale of stock to the director and injured him independently of any harm to the corporation.

There is no basis for petitioner's claim that there is a conflict between the Decision and *Pepper* or *Strong*. The Court of Appeals applying Delaware law held that petitioner's claim is a derivative claim and cannot be asserted by a shareholder once his shares are cancelled. There is no showing of error in the application of Delaware law, or a conflict which should cause this Court to grant the petition.

III.

THIS CASE WAS DETERMINED ON ITS FACTS WITHIN ESTABLISHED LEGAL PRECEDENTS.

The Decision was based on the facts of this case, affirming the District Court's grant of summary judgment to the respondents, and relied on established precedents without expanding on existing case law. There is no need to grant certiorari to review the Decision.

IV.

THE DISTRICT COURT HAD DISCRETION NOT TO ENTER A DEFAULT JUDGMENT.

Petitioner seeks review of the affirmance by the Court of Appeals of the District Court's exercise of discretion to refuse to enter a default judgment based upon the Stipulation. Petitioner asserts that the District Court abused its discretion in deciding not to enter a default judgment based on the Stipulation. Petitioner shows no split in the federal circuits or substantial issue with regard to the Decision which should lead this Court to grant the petition for certiorari.

In the Stipulation, petitioner, MCEG and Forum agreed that the corporations would not oppose petitioner's motion to enter a default judgment against them in this case, provided that petitioner would only seek to enforce the judgment against the corporations' liability insurance carriers. Resp. App. 29a. The Stipulation was approved by the Bankruptcy Court in which the corporations were debtors. Resp. App. 33a. The insurance carriers were not parties to the Stipulation. Resp. App. 35a. The District Court held that the Stipulation implicated the rights of the insurers and that, in these circumstances, it would be a violation of their due process rights to enter a default judgment against the corporations which would be enforceable against the insurers. The Court of Appeals affirmed. There is no issue with regard to the refusal to enter a default judgment which should cause this Court to grant the petition.

A district court has discretion whether to enter a default judgment. Federal Rules of Civil Procedure, Rule 55(b) ("Judgment by default *may* be entered . . . by the Court . . .". Emphasis added). *See Eagle Associates v. Bank of Montreal*, 926 F.2d 1305, 1307 (2d Cir. 1991) ("Default judgments implicate

sharply conflicting policies, and the trial judge, . . . is entrusted with the task of balancing those competing considerations."), *Erwin DeMartino Trucking Co. v. Jackson*, 838 F. Supp. 160, 162 (S.D.N.Y. 1993). It would be poor policy to deny a district court the discretion not to enter a default judgment if to do so would be unjust or contrary to the evidence or law. *PPK v. Autofidelity Inc.*, 740 F.2d 120, 123 (2d. Cir. 1984); *Sinicorpi v. Milone*, 915 F.2d 66, 68 (2d. Cir. 1980).

The Court of Appeals properly affirmed the refusal of the District Court to "rubber stamp" the Stipulation which was an attempt to prejudice the rights of the insurance companies who were not parties to the Stipulation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — TRANSCRIPT OF THE DISTRICT COURT OPINION FROM THE BENCH OF JUDGE CHARLES L. BRIEANT DATED JANUARY 27, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 4494

JAN M. WEINBERG,

Plaintiff,

-against-

MANAGEMENT COMPANY ENTERTAINMENT GROUP, INC., FORUM HOME VIDEO, INC., JONATHAN D. KRANE, WILLIAM J. ROUHANA, JR. AND WINSTAR CORPORATION,

Defendants.

United States Courthouse
White Plains, New York
January 27, 1995
11:55 o'clock a.m.

Before:

HON. CHARLES L. BRIEANT,
District Court Judge

* * *

[24] THE COURT:

* * *

Appendix A

This is an interesting case which has become procedurally quite convoluted. The Court finds no fault with anyone being persistent or seeking to renew matters [25] which have been decided, but the Court is reluctant to change its views of matters unless clearly persuaded that the prior decision was incorrect. It's the obligation of the trial court to make rulings and move on and that's what I've tried to do.

We have presently before the Court five separate motions. The plaintiff has moved for an order granting judgment by default under a provision which I will discuss later and reopening the discovery for the issue of damages and the like. The individual defendants, Rouhana and Krane, were officers/ directors of the corporate defendants at the relevant times.

Plaintiff also moves to revise this Court's April 22, 1992 order and the judgment of May 22, 1992 made pursuant to rule 54(b) by setting aside the Court's order granting summary judgment to all defendants. That is based upon the inherent power of the Court to correct its prior errors, if they are errors, and to join in the case liability insurers previously mentioned referred to papers as Cigna, Fireman's Fund, Chubb and Pacific Indemnity.

And the defendants, Rouhana and Winstar Corporation, which is believed to be controlled by Rouhana, have moved for summary judgment in their favor on the fourth claim of the complaint and Mr. Krane has moved for partial summary judgment in his favor on the fourth claim of the [26] complaint and Mr. Rouhana and Winstar have moved for final judgment, dismissing the complaint against them with prejudice.

The following facts are considered to be relevant to this Court's decision on all these motions.

Appendix A

In 1987, Mr. Weinberg, the plaintiff in this case, entered into an agreement with a corporation known for convenience as MCEG, pursuant to which MCEG purchased all the shares of common and preferred stock of Forum, Inc. from Mr. Weinberg.

Under that agreement Mr. Weinberg received certain financial rights which were never honored. In July 1990 this particular lawsuit was filed alleging claims for fraud under common law and under the federal securities laws, in connection with the 1987 transaction, breach of fiduciary duty, corporate waste and breach of contract and then the inevitable RICO violations.

The Court has previously opined on this matter, and at least for purposes of these motions presently before me today, I accept the idea that there was ordinary, traditional common law corporate waste which diluted MCEG of its assets and which constitute a breach of duty these officers and directors had to MCEG and, in turn, disabled MCEG from paying the preferred dividends or paying the contract obligations which it had to Mr. Weinberg.

[27] Right after this action was commenced both MCEG and Forum Inc. became debtors in bankruptcy proceedings filed under Chapter XI of the United States Bankruptcy Code and pending in the Bankruptcy Court for the Central District of California.

When this occurred, the plaintiff in this lawsuit did not request nor was there any modification of the automatic stay in either of these bankruptcy proceedings to allow the plaintiff to pursue his lawsuit.

Appendix A

After the discovery cutoff date, Mr. Rouhana and Mr. Krane and Winstar moved for summary judgment dismissing the complaint against them and the plaintiff moved for summary judgment against those defendants.

On April 22, 1992, this Court rendered a decision and order granting summary judgment as to all the defendants, dismissing all counts asserted against them and the decision was without prejudice to the plaintiff's right as a Forum Inc. shareholder to bring a derivative action against the individual defendants, Krane and Rouhana, for corporate waste and for breach of fiduciary duty on behalf of Forum. And the court assumed, although there were no evidentiary findings as such, that there was an adequate basis to do that in fact.

Any such action may have required either a demand on the board of directors or showing under the rule that [28] such a demand would be futile. The Court allowed plaintiff, as a case management order, 60 days in which to seek leave from the California Bankruptcy Court, where Forum's and MCEG proceeding was pending, to pursue these derivative claims against the defendants, the other defendants on Forum's behalf.

But Mr. Weinberg did not seek Bankruptcy Court leave to be released from the stay and authorized to pursue a derivative claim on Forum's behalf and for all that appears here, he never made demand on the debtor in possession to sue on the claim.

Instead the plaintiff attempted to file a spurious appeal from this Court's April 22, 1992, summary judgment decision or order to the Second Circuit Court of Appeals and, thereafter, in order to facilitate Appellate review, this Court entered a judgment on May 22, 1992, dismissing the complaint so that the plaintiff would have a final judgment from which to appeal.

Appendix A

On February 10, 1993, a panel of our Court of Appeals, as I noted earlier, dismissed the plaintiff's appeals and held that the bankruptcy stay had not been lifted at the time this Court issued its orders and in its judgment this Court could not adjudicate claims involving Forum or MCEG, which were debtors in bankruptcy, even if the nature of the adjudication was to dismiss the claimants [29] without prejudice.

The Court finds that that's the law of the case. The Court of Appeals also concluded, correctly, I think, that because the April 22 and May 22 order and judgment did not adjudicate all claims as to all parties because dismissal as to the debtors without prejudice was void, it had no jurisdiction to consider the balance of the appeal under Section 1291 of Title 28.

Thereafter, this action lay largely dormant. There were proceedings in 1993 on March 9, familiarity with which is assumed. The defendants moved to enter a final judgment and that was denied. The plaintiff moved to set aside the April 22, 1992 order as wrong and that was denied also.

So instead of being asked to chew the cabbage twice, which the Court usually refuses to do, in effect, we're being asked three times.

Thereafter, a very unusual thing happened, almost incredible. There was a stipulation dated August 24, 1994 in writing between Mr. Weinberg and the debtors in the Chapter XI proceedings, which was approved by the Bankruptcy Judge and the bankruptcy stay was modified. And the order states in relevant part as follows:

"2. Jan M. Weinberg, (Weinberg) is granted limited relief

from the automatic stay and the discharge injunction as to the debtors Management Company Entertainment Group, [30] Inc. and Forum Home Video, Inc., (debtors), shall be modified for the sole purpose of allowing Weinberg to obtain a judgment by default in the action against the debtors, being the action and the docket number in the United States District Court for the Southern District of New York, and to enforce such judgment by default solely against the debtor's liability insurers, and the proceeds of the debtor's liability insurer's policies."

And it goes on to say that the debtors would not be required or permitted to defend the action and hereby agree to the entry of a default judgment against the debtors of the action.

That constitutes a reading of the relevant part of this rather incredible order. This Court finds, as a matter of law, that consent to a default judgment can never bind an insurer to pay a third-party's claim against the insured, because it's implicit in the entire concept of insurance that the insurer owes a duty of defense and also has a right to defend before the insurer, may be required to pay.

And this is a kind of a bizarre suggestion, and I say that with all respect to the Bankruptcy Judge, that somehow he can authorize debtors to consent to a default judgment and thereby make that default judgment, in effect, binding upon the insurers and to forbid the insurers by so many words to defend the case in the name of the debtors [31] which insurers under their policies are clearly entitled to do.

First relief sought here is that the Court enter a default judgment in this action based solely on the stipulation. When you were you all here on October 21, 1994, this Court expressed the

opinion that the stipulation in the Bankruptcy Court, and the order which resulted therefrom, implicated parties other than the plaintiff and the debtors, namely, the insurers who were not parties to it.

And the Court concluded that the insurance carriers should be given an opportunity to appear and respond, state their position with regard to the stipulation. All insurance companies have either appeared or notified the court they do not wish to participate and in each case have reaffirmed their denial of coverage of the claims sought to be collected from them.

To permit a default judgment to be entered which would be enforceable against the insurers, would be a rather bizarre violation of the insurer's right to due process. And the Court simply sees no purpose whatever in granting such a judgment and declines to do so.

This Court still holds to its initial theory that this started out as a derivative claim belonging to Forum for breach of fiduciary duty for corporate waste and [32] unlawful diversion of assets, which, in turn, prevented the corporation from declaring the dividends to which Mr. Weinberg was entitled. There may have been securities fraud somewhere but it wasn't here.

The plaintiff elected not to seek leave of the Bankruptcy Court to pursue the derivative claim and the Court concludes, as a matter of law, that he cannot do so now for several reasons.

The first place, he has no standing because he's no longer a shareholder, secondly, at least as to Krane, the claim is barred by release which was issued in compliance with the plan or pursuant to the plan or possibly by the plan itself.

As to the other defendants, they seem also to be relieved or discharged as a result of the plan, but this Court doesn't have to reach that particular issue; and that issue should be resolved either in the Bankruptcy Court or in the District Court in Central California.

The Court does not believe that there's any possibility at all, within due process and within our jurisdiction, to permit the plaintiff here to pursue the insurance carriers who have disclaimed, simply as a result of the stipulation or a default judgment to be entered under the stipulation.

Any such judgment would be a nullity and can't be [33] enforced against the debtors and can't be enforced against the insurers for reasons of due process. Therefore, the Court refuses and declines to enter any default judgment here acting in reliance on the stipulation or the order of the Bankruptcy Court. This Court has previously revisited the issue of whether the claims properly belong to the debtors or the debtors' successor and I remain convinced that's so and I decline, as a matter of law, to modify the prior decision or vacate the prior orders.

The Court determined, after careful consideration, these claims belonged to the corporations which were defrauded and on re-examination of this issue at the plaintiff's request, the Court is still of the firm belief the corporate waste which caused the injury belonged to the debtor, Forum.

As I say, the stipulation obtained from the Bankruptcy Court as a part of the discharge of the debtors and their reorganization cannot be implemented because it implicates the rights of nonparty insurance companies which have all disclaimed coverage for the injuries alleged.

There's, therefore, no purpose in joining these parties other than to the extent they've been permitted to appear already. The claim is that there's no coverage and, in any event, it would seem that with the aid of the Bankruptcy Judge, the debtors who were the insureds, have [34] already breached the provisions in the policy which prohibit them from settling a lawsuit without the prior consent of the insurers.

If you consent to a default judgment, I suppose that's the same as settling a lawsuit. Cigna asserts that it never issued a general liability policy covering either of the debtors, but only a D&O policy and that under that policy, the debtors were only entitled to be reimbursed for money they were required to pay any officers and directors as a result of claims asserted against them.

The Court concludes the law of California is correctly reflected in the *Moradi-Shalal* case and there's no private action under the statute which could be brought thereunder, and even if it were there, this would probably not be the place for such action. Cigna has already provided evidence that it was released and it's not possible for this plaintiff to have any greater rights under the D&O policy than the insured persons do.

The Court essentially believes that as a result of the bankruptcy, this case, for all purposes, is extinct. The Court believes its prior determination was correct and that Mr. Weinberg has no status to claim in this action against the insurers as a nonparty or third-party and that the so-called stipulated judgment can't be entered and has no validity.

[35] Also at this present time, Mr. Weinberg has no standing to bring a derivative action because he's no longer a shareholder

and so, essentially, there's nothing here left to adjudicate. And the Court believes that the bankruptcy has been concluded by a reorganization, so the stay is no longer an issue, but there is an injunction which is outstanding there and that has not been modified.

So, essentially, this Court adheres to its prior position as to whether this is a derivative claim. Delaware law applies and our Court of Appeals interpreting Delaware law in the Ionesphere case in 1994, I think clearly shows this would have been a derivative claim if it had been brought at the right time and after having been relieved from the stay. And there's no direct or independent injury here except resulting from the waste which made the corporation incapable of performing its obligations to Mr. Weinberg.

So the Court concludes that the respective motions of the plaintiff which have been mentioned, must be and they hereby are denied.

The Court declines to revise its prior decision, declines to grant the default judgment for the reasons stated and declines to join the insurers.

The Court grants summary judgment in favor of Rouhana and Winstar and Krane as to the fourth claim in the [36] complaint, which I think is the only remaining claim for adjudication and adjudges final judgment be entered here dismissing the complaint in its totality against defendants and determining as to the debtors, this case is moot because it is fully subsumed in the final conclusion of the bankruptcy proceedings in the Central District of California.

Appendix A

There's nothing here left to be adjudicated as to the debtors because it was all covered or could have been covered in the final approval of the plan of reorganization in that court and, therefore, the action is dismissed with prejudice as to MCEG and Forum.

Now, the foregoing constitutes the court's oral decision on these various matters. If there is something which has been overlooked or something which is necessary to permit you all to have a fair and complete record to review this Court's disposition in the Court of Appeals, if so advised, you may now ask me for what you need to have comment upon or add to the Court's findings and conclusions.

* * *

APPENDIX B — EXCERPTS FROM THE BANKRUPTCY COURT ORDER RE CONFIRMATION OF DEBTOR'S SECOND AMENDED JOINT PLAN OF REORGANIZATION DATED MARCH 19, 1992

JOSEPH A. EISENBERG and
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Attorneys for Debtors and
Debtors in Possession

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. LA 90-27838-RR
(Jointly Administered)

Chapter 11

* * *

DATE: March 16, 1992
TIME: 9:00 a.m.
PLACE: Courtroom "1"
201 N. Figueroa St.
Los Angeles

In re

MCEG, INC., and Related Cases,

Debtors.

Appendix B

ORDER RE CONFIRMATION OF DEBTOR'S SECOND AMENDED JOINT PLAN OF REORGANIZATION

[2] AT LOS ANGELES, CALIFORNIA, IN THIS DISTRICT, ON THE __ DAY OF MARCH 1992.

The hearing upon confirmation of the "Debtors' Second Amended Joint Plan of Reorganization," (hereinafter the "Second Amended Plan,"), was held on March 19, 1992, before the Honorable Robin Riblet, United States Bankruptcy Judge. . . . The Court has considered the pleadings and record in this case, the arguments of counsel at hearing upon the confirmation, and the Plan has been served upon all creditors, equity security holders, the Office of the United States Trustee, and all other parties in interest required to be served, and timely and proper notice of the hearing on confirmation of the Debtors' Second Amended Plan has been given.

* * *

[4] * * *

7. ORDERED, that all securities of the Debtors shall be deemed cancelled as provided in the Second Amended Plan; and IT IS FURTHER

* * *

[6] 17. ORDERED, that this Court shall and it hereby does retain jurisdiction over this case in the manner described in the Bankruptcy Code and Article XI of the Second Amended Plan.

Appendix B

IT IS SO ORDERED.

DATED: March 19, 1992

ROBIN L. RIBLET
THE HONORABLE ROBIN RIBLET
UNITED STATES BANKRUPTCY JUDGE

APPENDIX C — EXCERPTS FROM DEBTORS SECOND AMENDED JOINT PLAN OF REORGANIZATION DATED MARCH 19, 1992

* * *

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. LA 90-27838-RR
(Jointly Administered)

Chapter 11

* * *

In re

MCEG, INC., and Related Cases.

Debtors.

DEBTORS' SECOND AMENDED JOINT PLAN OF REORGANIZATION

DATE: March 19, 1992
TIME: 9:00 a.m.
PLACE: Courtroom "1"

DEBTORS' SECOND AMENDED JOINT PLAN OF REORGANIZATION
(February 5, 1992)

Pursuant to Section 1121(a) of the Code, M.C.E.G., Inc., a Delaware corporation. . . . and Forum Home Video, Inc., a

Appendix C

Delaware corporation, hereby collectively propose this Debtors' Second Amended Joint Plan of Reorganization (February 5, 1992):

* * *

ARTICLE I
DEFINITIONS

A. In addition to such other terms as are defined in other sections of the Plan, the terms listed below shall have the following meanings:

* * *

"*Interest*" means (a) the capital stock or any ownership rights in the capital stock of the Debtors owned by any person or entity other than a Debtor, and (b) any right, warrant or option, however arising, to acquire the capital stock or any other equity interest, or any rights therein, of the Debtors.

* * *

D. *Interests*

1. *Class D-1:* Class D-1 consists of all allowed Interests of holders of Old Common Stock as holders of such stock, excluding the Class D-2 Interests.

2. *Class D-2:* Class D-2 consists of all Interests in the Debtors, excluding the Class D-1 Interests. The vote of the holders of the Class D-2 Interests shall not be solicited. Class D-2 shall be deemed to have rejected the Plan, and confirmation of the Plan

will be sought pursuant to the provisions of Section 1129(b) of the Code notwithstanding such deemed rejection.

* * *

E. *Class D-1 (Interests of Holders of Old Common Stock)*

Class D-1 is impaired. Holders of Class D-1 allowed Interests shall receive Pro Rata Distributions from the General Distribution Fund. The Liquidation Estate shall make Distributions of 200,000 shares of the New Common Stock in the General Distribution Fund Pro Rata to the holders of allowed Interests in Class D-1 in accordance with the terms of Section C of Article VI hereof.

F. *Class D-2 (All Other Interests)*

Class D-2 is impaired. The Interests of Class D-2 shall be subordinated to Class D-1 and the holders thereof shall receive no Distributions under the Plan on account of or with respect to such Class D-2 Interests.

* * *

ARTICLE VI
IMPLEMENTATION OF THE PLAN AND EXECUTION OF ITS TERMS

A. *Reorganized MCEG*

* * *

Appendix C

4. *Cancellation of All Instruments.* As of the Effective Date, all securities and instruments representing a Claim or an Interest shall be cancelled. From and after the Effective Date, such securities and instruments shall be deemed null and void and shall represent only the right to receive the distributions, if any, under the Plan accorded to the holder of an Allowed Claim or Interest.

* * *

APPENDIX D — EXCERPTS FROM THE SETTLEMENT AGREEMENT DATED SEPTEMBER 26, 1991

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into this 26th day of September 1991 by JONATHAN KRANE, THE JONATHAN KRANE GROUP, SALAIRE CORPORATION, SALLY KELLERMAN, SWEET LIFE, INC., and their respective affiliates, excluding the MCEG Parties (collectively, the "Krane Parties"), on the one hand, and MCEG, INC., the Chapter 11 Debtors whose cases are consolidated with that of MCEG, Inc. and Producers Film Financing, Inc. (collectively, the "MCEG Parties") on the other hand.

1. (a) As used in this Settlement Agreement, the following terms shall have the following meanings:

"Claims" shall mean actions, causes of action, claims, demands, suits, arbitration proceedings and/or other proceedings, in law or in equity, including cross-claims and counterclaims, including any claim arising under any provision of the Bankruptcy Code, whether known or unknown, anticipated or unanticipated, suspected or unsuspected, or fixed, contingent or conditional.

* * *

5. (a) Except as to such rights or claims expressly created by this Settlement Agreement, the MCEG Parties and the Related Parties hereby release and forever discharge the Krane Parties from and against any and all Claims and Liabilities (collectively, the "MCEG Claims"), any of the MCEG Parties or the Related Parties now have (whether known or unknown) or may hereafter have against any of the Krane Parties by reason of any matter,

cause or thing whatsoever arising out of events occurring from the beginning of time to the date hereof. Each of the MCEG Parties and Related Parties represents and warrants that it has not assigned or transferred any interest in any MCEG Claim which it may have or may have had against the Krane Parties. Each of the MCEG Parties and Related Parties expressly acknowledges that this Settlement Agreement may be raised as a complete defense to any action or Claim initiated by or on behalf of any of them relating to any MCEG Claim.

(b) Each of the MCEG Parties and the Related Parties acknowledges that it has been advised by legal counsel, and is familiar with the provisions of California Civil Code Section 1542, which provides as follows:

> "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW ABOUT OR SUSPECT TO EXIST IN ITS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM, MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR."

Each of the MCEG Parties and Related Parties, being aware of this Code Section, hereby expressly waives any rights it may have thereunder, as well as under any other statutes or common law principles of similar effect under California or Federal law, or the law of any other jurisdiction.

* * *

APPENDIX E — EXCERPTS FROM THE BANKRUPTCY COURT ORDER AUTHORIZING DEBTORS TO COMPROMISE CONTROVERSY WITH JONATHAN KRANE DATED NOVEMBER 16, 1991

* * *

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. LA 90-27838-RR

CHAPTER 11

(Jointly Administered)

* * *

In re

MCEG, INC., and Related Cases,

Debtors.

ORDER AUTHORIZING DEBTORS TO COMPROMISE CONTROVERSY WITH JONATHAN KRANE

* * *

[2] On October 25, 1991, at 9:00 p.m., a hearing was held before the Honorable Robin L. Riblet, United States Bankruptcy Judge, in Courtroom "1", Figueroa Plaza, 201 N. Figueroa St., Los Angeles, California, to consider the motion (the "Motion") brought by MCEG, INC., and the above-captioned Debtors and Debtors in Possession ("Debtors"), for authority to compromise a controversy with Jonathan Krane.

Appendix E

* * *

The Court having considered the Motion, . . . and good cause appearing therefor, it is hereby

ORDERED, that the Debtors' Motion is hereby approved; and

IT IS FURTHER ORDERED, that the Objections to the Motion filed by BV and US Trust, and each of them, are hereby overruled; and

[3] * * *

IT IS FURTHER ORDERED, that the Debtors are hereby authorized to enter into the settlement and compromise with Jonathan Krane as set forth more particularly in the Motion and the Settlement Agreement;

* * *

Dated: November 16, 1991

ROBIN L. RIBLET
THE HONORABLE ROBIN L. RIBLET,
UNITED STATES BANKRUPTCY JUDGE

APPENDIX F — STIPULATION FILED AUGUST 25, 1994

LESLIE A. COHEN (SBN 93698) and
ADAM M. REICH (SBN 158685),
Members of
LEVENE & EISENBERG,
a Professional Corporation
1901 Avenue of the Stars, Suite 1600
Los Angeles, California 90067
Telephone: (310) 551-1010

Attorneys for Reorganized Debtors

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. LA 90-27838-RR
(Jointly Administered)

DATE:	September 13, 1994
TIME:	2:00 p.m.
CTRM:	"104" 222 East Carrillo Santa Barbara, CA

In re

MCEG, INC., and Related Cases,

Debtor.

Appendix F

JAN M. WEINBERG,

Movant,

vs.

MCEG, INC. and FORUM HOME VIDEO, INC.,

Respondents.

STIPULATION (1) GRANTING LIMITED RELIEF FROM THE AUTOMATIC STAY, (2) MODIFYING PERMANENT DISCHARGE INJUNCTION, AND (3) DISMISSING MOTION FOR RECONSIDERATION; ORDER THEREON

TO THE HONORABLE ROBIN L. RIBLET, UNITED STATES BANKRUPTCY JUDGE:

This Stipulation is entered into by and between MCEG, Inc. and Forum Home Video, Inc., respondents and debtors in the above-captioned bankruptcy case ("Debtors"), by and through their counsel of record, Levene & Eisenberg, a Professional Corporation, and Jan M. Weinberg ("Weinberg"), by and through his counsel of record, Mayer, Brown & Platt, with reference to the following facts:

RECITALS

A. On or about July 6, 1990, Jan Weinberg, a shareholder of Forum Home Video, Inc., filed an action in the Southern District of New York (the "New York District Court") against the Debtors and certain directors and officers of the Debtors and their affiliates, alleging monetary damages of $10,000,000.00 and other allegations (the "Action").

Appendix F

B. The above-captioned Debtors' Chapter 11 cases were first commenced in August, 1990.

C. The Bankruptcy Court entered Orders directing joint administration of all the cases and substantive consolidation for all but two cases.[1]

D. Upon the filing of the Debtors' Chapter 11 cases, and by virtue of the automatic stay provision of Section 362 of the Bankruptcy Code, the New York Court Action as against the Debtors was automatically stayed.

E. Thereafter, the New York District Court granted summary judgment to all defendants in the Action and thereafter dismissed the Complaint in the Action as to the Debtors (the "New York Summary Judgment Order").

F. On March 19, 1992, the Bankruptcy Court entered its "Order Confirming the Debtors' Second Amended Joint Plan of Reorganization" (the "Confirmation Order"). The entry of the Confirmation Order served as a discharge of any and all claims against the Debtors and an injunction from proceeding with actions in connection with any such claims.[2]

G. On or about June 8, 1992, the attorney of record for the Debtors in the Action filed a "Notice of Confirmation of Debtors'

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1. STERLING ENTERTAINMENT COMPANY and MEDIA RESOURCES CREDIT CORPORATION, are the entities not substantively consolidated.

2. The only litigation permitted to proceed was the lawsuit filed in the State Court in California by Simon Lewis.

Second Amended Joint Plan of Reorganization" with the New York District Court.

H. Shortly thereafter, Weinberg filed an appeal of the judgment entered in the Action with the United States Court of Appeals, Second Circuit (the "Court of Appeals") (the "New York Appeal").

I. On or about June 22, 1992, Weinberg served notice of the New York Appeal upon the Debtors.

J. Thereafter, the Debtors filed a Motion for (1) Enforcement of Debtors' Second Amended Joint Plan of Reorganization and to Compel Jan Weinberg to Dismiss Appeal Against MCEG, Inc., and Forum Home Video, and (2) for Sanctions for Willful Violation of the Order Confirming the Debtors' Second Amended Plan of Reorganization, (the "Enforcement Motion").

K. On November 2, 1992, an emergency hearing was held on the Enforcement Motion, at which time the Bankruptcy Court, granted the Enforcement Motion.

L. Thereafter, on November 4, 1992, the Debtors, having served Weinberg on November 3, 1992, filed the proposed Report and Recommendations (incorporating the findings of facts and conclusions of law) with the Bankruptcy Court (the "Recommendations")[3].

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3. Since the Enforcement Motion related to an action involving contempt, the Bankruptcy Court required that Findings and Recommendations be submitted to the Bankruptcy Court whereupon it would refer them to the District Court and recommend the entry of the Order on the Enforcement Motion.

M. On November 24, 1992, the Bankruptcy Court signed the Recommendations and, thereafter, on November 30, 1992, the Recommendations were entered on the Bankruptcy Court's docket. On November 30, 1992, based upon the Recommendations, the District Court entered its Order granting Debtor's Enforcement Motion (the "District Court Order"). Pursuant to the District Court Order, sanctions were awarded to the Debtors against Weinberg in the amount of $13,910.87 (the "Sanctions Award").

N. On January 4, 1993, thirty-five (35) days after entry of the District Court Order, Weinberg filed his notice of appeal of the District Court Order with the district court (the "Notice of Appeal"). The Ninth Circuit Court of Appeal ("Ninth Circuit") dismissed the appeal as late filed. On May 5, 1993 the Ninth Circuit issued an Order denying Weinberg's motion to reinstate the appeal.

O. Weinberg continued to prosecute and perfect the appeal. In February, 1993, the Second Circuit dismissed the appeal for lack of jurisdiction.

P. In approximately September, 1993, Weinberg filed a "Motion for Relief from Judgment or in the Alternative for Reconsideration" (the "Reconsideration Motion"), seeking reconsideration only with respect to the Sanctions Award.

Q. On or about September 15, 1993, prior to the District Court's ruling on the Reconsideration Motion, Weinberg filed his Motion for Relief from the Automatic Stay Pursuant to 11 U.S.C. § 362 (the "Stay Motion"), seeking authority to proceed with the Action against the Debtors.

R. On or about October 4, 1993, the District Court granted the Reconsideration Motion and vacated the Sanctions Award. The District Court determined that had Weinberg originally sought relief from the automatic stay prior to taking his appeal to the Second Circuit, the Bankruptcy Court would have granted the requested relief.

S. On October 6, 1993, at the hearing on the Stay Motion, the Honorable Robin Riblet, United States Bankruptcy Judge, modified the automatic stay for the sole purpose of allowing Weinberg to voluntarily dismiss the Debtors as party defendants to the Action.

T. On or about October 7, 1993, the District Court entered its Order granting the Reconsideration Motion (the "Reconsideration Order").

U. Thereafter, on November 5, 1993, the Debtors filed a motion for reconsideration ("Debtors' Reconsideration Motion") of the Reconsideration Order. In addition, the Debtors prepared for filing with the District Court, a motion (the "District Court Sanctions Motion") requesting sanctions for Weinberg's continued prosecution of the New York Action.

V. On or about July 6, 1994, Weinberg filed his "Motion To Modify Permanent Injunction Pursuant to 11 U.S.C. § 524" ("Motion To Modify Injunction"), which hearing was originally scheduled for August 3, 1994.

W. On or about July 18, 1994, Weinberg and the Debtors entered into the "Stipulation Re Continuance of Hearing On Motion To Modify Permanent Injunction", continuing the hearing to September 13, 1994.

X. The Debtors and Weinberg have now agreed to resolve the issues concerning the Debtors' Reconsideration Motion and the Motion to Modify Injunction without further litigation.

NOW THEREFORE, IT IS HEREBY STIPULATED, by and between the Debtors and Weinberg, subject to the order of the Court as follows:

STIPULATION

1. Weinberg is granted limited relief from the stay, and the Debtors' discharge injunction shall be modified for the sole purpose of allowing Weinberg to obtain a judgment by default in the Action against the Debtors, and to enforce such judgment by default solely against the Debtors' liability insurers and the proceeds of the Debtors' liability insurance policies. The Debtors shall not be required or permitted to defend the Action, and hereby agree to the entry of a default judgment against the Debtors in the Action.

2. The Debtors have not made any representations concerning the validity, extent or enforceability of the Debtors' insurance policies or coverage related to the Action, and Weinberg agrees that he has not relied and will not rely on any such statements that the Debtors may have made with respect thereto.

3. The Debtors are entering into this stipulation upon the representation of Weinberg that Weinberg and his counsel believe that Weinberg's discovery activities will impose no undue burden on the Debtors' estate. If one or more informal discovery requests, individually or cumulatively, necessitates the time and efforts of any person actively engaged in the affairs

of the Debtors which, in the Debtors' sole discretion, unduly burdens administration of the Debtors' estates, such discovery shall be rescheduled. Any dispute involving whether discovery unduly burdens the Debtors' estates shall be resolved by the Bankruptcy Court as necessary upon motion of Weinberg or the Debtors.

4. Weinberg shall be permitted to go to the Debtors' document warehouse at a time or times convenient to the Debtors to review documents relevant to the Action. Prior to such document review, Weinberg shall submit to Debtors a list of specific categories of all documents Weinberg desires to review in connection with the Action. Debtors shall be required to notify Weinberg within three (3) days upon receipt of such document list if Debtors dispute the relevance of any document to be reviewed.

5. All other discovery activities related to the Action, if any, which require the participation of the Debtors, will be conducted by Weinberg on an informal basis, and will accommodate the Debtors' scheduling abilities.

6. To the extent Weinberg must formally propound any notice(s) of deposition of the Debtors in compliance with the Federal Rules of Civil Procedure, Weinberg agrees that, prior to issuing any notice, Weinberg will contact Debtors to arrange all depositions (including any continuances thereof) at a time, date and location convenient to the Debtors.

7. In no event may Weinberg share in any distribution of estate assets other than insurance proceeds (if any) in respect of any judgment rendered in the Action.

8. Weinberg bears the sole risk that insurance proceeds will be available to satisfy any judgment in the Action. Under no circumstances will the Debtors or their estates have any monetary or other liability arising out of a denial of any coverage by any insurers as a result of any action or inaction by the Debtor or estates prior to the date hereof.

9. The Debtors shall retain $10,000 from the Sanctions Award, notwithstanding any decision on the Debtors' Reconsideration Motion, which Motion shall be withdrawn upon entry of an Order at the Bankruptcy Court approving this Settlement. The remainder of the Sanctions Award shall be returned to Weinberg.

10. This Stipulation shall only be binding upon the parties if the Bankruptcy Court approves it in its entirety without modification and retains jurisdiction to resolve disputes arising hereunder.

11. Debtors agree not to file their District Court Sanctions Motion.

DATED: August 25, 1994

MCEG, INC. and
FORUM HOME VIDEO, INC.

By: s/ Adam M. Reich
ADAM M. REICH, a Member of
LEVENE & EISENBERG,
a Professional Corporation
Attorneys for Reorganized Debtors

Appendix F

DATED: August 24, 1994 JAN M. WEINBERG

By: s/ Christopher P. Murphy
CHRISTOPHER P. MURPHY,
MAYER, BROWN & PLATT,
Attorneys for Movant

APPENDIX G — ORDER FILED AUGUST 26, 1994

ORDER

The Court, having considered the foregoing conclusion entered into between the parties, and good cause appearing therefor, hereby ORDERS:

1. The Stipulation is approved in its entirety.

2. Jan M. Weinberg ("Weinberg") is granted limited relief from the automatic stay, and the discharge injunction as to the debtors, MCEG, Inc. and Forum Home Video, Inc. ("Debtors"), shall be modified for the sole purpose of allowing Weinberg to obtain a judgment by default in the action against the Debtors, entitled *Weinberg v. Management Company Entertainment Group, Inc. et. al.*, No. 90-CV-4494 in the United States District Court for the Southern District of New York (the "Action"), and to enforce such judgment by default solely against the Debtors' liability insurers and the proceeds of the Debtors' liability insurance policies. The Debtors shall not be required or permitted to defend the Action, and hereby agree to the entry of a default judgment against the Debtors in the Action.

3. The Debtors have not made any representations concerning the validity, extent or enforceability of the Debtors' insurance policies or coverage related to the Action, and Weinberg agrees that he has not relied and will not rely on any such statements that the Debtors may have made with respect thereto.

4. The Debtors are entering into this Stipulation upon the representation of Weinberg that Weinberg and his counsel believe that Weinberg's discovery activities will impose no

undue burden on the Debtors' estate. If one or more informal discovery requests, individually or cumulatively, necessitates the time and efforts of any person actively engaged in the affairs of the Debtors which, in the Debtors' sole discretion, unduly burdens administration of the Debtors' estates, such discovery shall be rescheduled. Any dispute involving whether discovery unduly burdens the Debtors' estates shall be resolved by the Bankruptcy Court as necessary upon motion of Weinberg or the Debtors.

5. Weinberg shall be permitted to go to the Debtors' document warehouse at a time or times convenient to the Debtors to review documents relevant to the Action. Prior to such document review, Weinberg shall submit to Debtors a list of specific categories of all document Weinberg desires to review in connection with the Action. Debtors shall be required to notify Weinberg within three (3) days upon receipt of such document list if Debtors dispute the relevance of any document to be reviewed.

6. All other discovery activities related to the Action, if any, which require the participation of the Debtors, will be conducted by Weinberg on an informal basis, and will accommodate the Debtors' scheduling abilities.

7. To the extent Weinberg must formally propound any notice(s) of deposition of the Debtors in compliance with the Federal Rules of Civil Procedure, Weinberg agrees that, prior to issuing any notice, Weinberg will contact Debtors to arrange all depositions (including any continuances thereof) at a time, date and location convenient to the Debtors.

8. In no event may Weinberg share in any distribution of

estate assets other than insurance proceeds (if any) in respect of any judgment rendered in the Action.

9. Weinberg bears the sole risk that insurance proceeds will be available to satisfy any judgment in the Action. Under no circumstances will the Debtors or their estates have any monetary or other liability arising out of a denial of any coverage by any insurers as a result of any action or inaction by the Debtors or estates prior to the date hereof.

10. The Debtors shall retain $10,000 from the Sanctions Award notwithstanding any decision on the Debtors' Reconsideration Motion, which Motion shall be withdrawn upon entry of an Order at the Bankruptcy Court approving this Settlement. The remainder of the Sanctions Award shall be returned to Weinberg.

11. This Stipulation shall only be binding upon the parties if the Bankruptcy Court approves it in its entirety without modification and retains jurisdiction to resolve disputes arising hereunder.

12. Debtors agree not to file their District Court Sanctions Motion.

8/26/94

s/ Robin Riblet
THE HONORABLE ROBIN RIBLET
UNITED STATES BANKRUPTCY JUDGE